

**CITY OF SHORELINE
HEARING EXAMINER**

FINDINGS, CONCLUSIONS AND DECISION

APPEAL OF CONDITIONAL USE PERMIT

PROJECT INFORMATION SUMMARY

APPLICANT: The Highlands, Inc. and The Highlands Sewer District

LOCATION: Northwest 155th Street and Second Avenue Northwest

PROJECT NUMBER: 201577

**SEPA THRESHOLD
DETERMINATION:** Determination of Nonsignificance

APPELLANTS: Greg Logan, Robert Barta, Nina Gettler, Allen Bennett and
Dan McKnight

For purposes of this decision, all section numbers refer to the Shoreline Municipal Code (SMC or Code) unless otherwise indicated.

BACKGROUND AND PROCEDURAL HISTORY

Decision

The Director of the Department of Planning and Development Services (Director or Department) issued a Notice of Decision and SEPA Threshold Determination of Nonsignificance on March 15, 2007 for a conditional use permit (CUP) to consolidate “legally non-conforming maintenance and utility facilities, including construction of the maintenance building, utility yard, grading, and drainage facilities.” The Department issued a revised Notice of Decision and SEPA Threshold Determination of Nonsignificance on March 29, 2007.

Prehearing Matters

The Hearing Examiner held a prehearing conference with the parties by telephone on May 25, 2007 to clarify the issues raised in the appeal and identify exhibits and witnesses. The Examiner issued a prehearing order that same day, setting forth the witnesses each party intended to call, a schedule for filing and exchanging exhibits, and the issues the parties had agreed were presented for decision.

Hearing

A hearing on the appeal was held on June 1, 2007. The Appellants were represented by Greg Logan; the Department was represented by Ian R. Sievers, City Attorney; and the Applicant was represented by G. Richard Hill, attorney-at-law. The Examiner visited the site on June 5, 2007.

The following witnesses offered testimony at the hearing:

For the Appellants: Greg Logan

For the Department: Glenn Pickus

For the Applicant: Paul Konraddy, Bruce Dodds, and Jason Walker

After considering the evidence in the record and inspecting the site, the Hearing Examiner enters the following findings of fact, conclusions and decision on the appeal:

FINDINGS OF FACT

Applicant

1. The Applicant consists of The Highlands, Inc. and The Highlands Sewer District. The Highlands, Inc. maintains and operates a water district for The Highlands, maintains the private roads and other facilities in The Highlands and handles contract obligations for franchise utilities within The Highlands. The Highlands Sewer District owns and operates the sanitary sewer and storm drainage systems within The Highlands.

2. The civil engineer for the Applicant testified that The Highlands Sewer District is a public utility district under state law, although there is no written documentation of this status in the record. The Department submitted a copy of Chapter 3.32 SMC, "Utility Tax," noting that the City utility tax is levied on "solid waste collection businesses," which include "every person who receives solid waste or recyclable materials, or both, as defined in this section, for transfer, storage, or disposal including but not limited to all collection services, public or private solid waste disposal sites, transfer stations, and similar operations." SMC 3.32.020 G. Again, there is no documentation in the record that The Highlands Sewer District pays this tax.

Site and Vicinity

3. The project site is located in the northeast portion of The Highlands Tracts subdivision at approximately the intersection of Northwest 155th Street and Second Avenue Northwest, and is immediately west of the Highland Terrace subdivision, which includes the Appellants' homes. (Exhibit 36) The project site is a portion of what is referred to as the "Forty Acres," or "[t]he unplatted tract north and east of the school, [that]

encompasses the dumping area, the Superintendent's house, and maintenance facility. In actuality, it covers about 35 acres after deducting for the school and roads." (Exhibit 25)

4. The Forty Acres is zoned R-4, the lowest density residential zone, which allows 4 dwelling units per acre. The purpose of this zone is "to provide for a mix of predominantly single detached dwelling units and other development types, such as accessory dwelling units and community facilities that are compatible with existing development and neighborhood character." SMC 20.40.030 A

5. The project site is the western part of the Forty Acres, between Willard Road and the eastern boundary of the property. It is heavily forested and largely undeveloped. On the southeastern corner of the property, just off Northwest 155th Street, there is a single-family residential structure, presently used as The Highlands' maintenance office, a residence for The Highlands' Superintendent and for meeting space, mail services and record storage. Just north of the residence is a 2,250 square-foot garage/maintenance building, where various maintenance and landscaping equipment is stored and maintained. Beneath the trees to the north and east of the maintenance building is a small, outdoor storage area, (considerably smaller than is represented on Exhibit 18), that is used for maintenance equipment and materials. A large ditch, resulting from work on The Highlands' water lines, runs north/south near the east property boundary shared with the Highland Terrace subdivision.

6. Willard Road, located to the west of the existing structures and storage area, generally runs north/south through roughly the center of the Forty Acres, intersecting with Northwest 155th Street on the south, and Kerry Drive on the north. (See Exhibit 15.) To the west of Willard Road, at its northern terminus, (outside the project site) is the large site referred to as "the dumping area" that is used for stockpiling yard and other green waste from residences in The Highlands, and for storage of various building materials and packaging. The Applicant reports that centralized collection of yard waste began in 1993. Approximately once every two years, a grinder has been brought in to grind up woody debris at this site, causing significant noise in the surrounding vicinity.

7. South of the green waste site on Willard Road is an attended recycling area for non-organic materials such as glass, metal, and plastics. It consists of three large bins for the exclusive use of The Highlands' residents. The Applicant reports that centralized collection of these materials also began in 1993.

8. Cascade Drive generally runs east-west through part of The Highlands and at its eastern terminus, intersects with Willard Road. (See Exhibit 15.) A large utility storage yard is presently maintained by The Highlands outside the project site, north of Cascade Drive and well to the west of Willard Road. This area is used for a shack/tool shed and storage of heavy equipment, including three dump trucks, a generator, a road grader, concrete Jersey Barriers, large spools, pipes, catch basins, and the like.

9. The property does not contain slopes greater than 40%. The project site is flat or gently sloped throughout except along the northern boundary, where slopes are approximately 20 percent.

10. Property to the north of the project site is zoned for, and developed with single-family residences.

11. The Highland Terrace neighborhood, located uphill to the west of the project site, is zoned R-6. Development is consistent with the zoning. The distance between existing development and storage on the project site and the boundary line with adjacent lots in the Highland Terrace neighborhood is approximately 30 to 60 feet. This area is forested, primarily with evergreen trees, and includes an understory of various shrubs and berry vines that obscure most of the Highland Terrace residents' views of the project site during the spring and summer months. Noise from operations at the existing shop at the project site is clearly audible to a person standing in the adjacent backyards in Highland Terrace.

12. A background review and site reconnaissance performed in February of 2005 by the Applicant's consultant determined that the property provides habitat for songbirds and cavity nesting birds, and that pileated woodpecker foraging stations exist in the standing, dead trees throughout the property. Pileated woodpeckers have been seen in the vicinity by nearby residents, but no nesting cavities were identified in the February 2005 reconnaissance or by the Appellants.

13. The only known stream in the area is Boeing Creek, which runs along the northern portion of the west part of The Highlands, and is located approximately one-quarter mile from the project site, and more than 900 feet from the boundary of the parcel. The project site drains to the south, toward the Seattle Golf Club.

14. The Applicants offered the following documentation of its historical use of the site: 1) board meeting minutes for The Highlands, Inc. from September of 1908, which reflect planning for work on Macadam Road and a pump house (Exhibit 41); 2) board meeting minutes for The Highlands, Inc. from March of 1909, which reflect that a motion was carried for the "entire Board of Trustees go to the property and pick out a suitable place for storehouse, office and supplies, and to construct suitable improvements for properly caring for same;" (Exhibit 41); 3) declarations from four Highlands' residents, each of whom states that he or she has lived in the Highlands for a considerable period of time, (one dating back to 1918), and that the Highlands has always had a maintenance facility that included equipment storage and a staging area in the approximate location of the present maintenance shed (Exhibits 37 through 40); 4) aerial photographs from as far back as 1936 which show structures at the approximate locations of the existing residence and maintenance shed on the project site, and a cleared area in approximately the location of "the dumping area" on the Forty Acres (Exhibits 15 and 20 through 23); and 5) a building permit issued to "The Highlands Water District" by King County in July of 1993, for a "small commercial building project" for a "storage building and re-gravel

existing driveway” (Exhibit 7). The King County permit lists the zoning as RS 1500, a residential zone.

Proposal

15. In December of 2005, The Highlands recorded a record of survey and large tract subdivision of five lots covering the forested area north of Cascade Drive, South of Kerry Drive and west of Willard Road. The subdivision includes both the existing "dumping area," and the existing utility yard north of Cascade Drive. The Applicant proposes to consolidate these functions on the project site.

16. The Applicant proposes to redevelop the project site, maintaining the existing residential structure and 2,250 square-foot shop, and adding a 5,800 square foot building for indoor storage and/or repair and maintenance of vehicles and equipment, a meeting room, space for security equipment, mail distribution and similar uses. The Applicant states that the new building will provide adequate storage for all supplies and equipment now stored outdoors on various sites. "Nothing will need to be stored outside." (Exhibit 3)

17. The Applicant also proposes to relocate the recycling bins and the yard waste collection function to this complex. Yard waste is to be collected on-site in “a trailer provided by Waste Management or another licensed recycling collection provider in a manner similar to that of a county transfer station” for processing off-site. An outside company will also remove the contents of the recycling drop boxes each week. (Exhibit 3)

18. Finally, the Applicant proposes a new, 60,000 square-foot storage yard north of the existing shop and the new maintenance building. Since all vehicles and equipment will be stored inside, the "planned utility yard will be for storage of natural items such as sand, gravel, soil, bark, plant material, and the like. It will also be used from time to time for temporary contractor storage of building materials such as pipe and lumber.” (Exhibit 3) The utility yard will be surfaced with crushed rock.

19. The project would include paving the existing road that leads from Northwest 155th Street to the existing shop, and extending it north, along the east edge of the new storage yard, where it will intersect with Kerry Drive at the northeast corner of the project site. (Exhibit 19) There will also be a new paved road built to the south of the existing road, which will proceed north from Northwest 155th Street, along the west side of the proposed new maintenance building, and then circle east just south of the new storage area to connect with the existing access road. (Exhibit 19) This new western road would provide access for Highlands’ residents to the recycling bins and yard waste trailer. The project would also include 32 new paved parking spaces and new drainage improvements. (Exhibit 11)

20. Due to elevation changes on the site, the roofline of the proposed new building will be approximately equal to the elevation of the backyards of the adjacent Highland

Terrace residences. (Exhibit 11) However, the residences and decks on these lots are located at a higher elevation than the backyards.

21. The Applicant's representatives testified that they do not expect to add maintenance staff or heavy equipment to the new facility and do not anticipate an increase in the current volume of vehicle traffic on the project site. The board of The Highlands, Inc., which consists of 10 to 15 people, will meet in the new building approximately once a month. The sewer district board, which consists of 2 to 5 people, will meet approximately 4 to 5 times per year.

22. The distance between the proposed project and adjacent lots in the Highland Terrace neighborhood will be approximately 20 to 30 feet. (Exhibit 9) The vegetation in this setback area will be supplemented with a mix of several hundred deciduous and coniferous trees. (Exhibits 9 and 14)

Department's Review

23. The Department determined that the Forty Acres had been used by The Highlands for many years for material storage, yard waste collection, and vehicle storage and maintenance, as well as for the location of The Highlands, Inc.'s maintenance staff. (Exhibit 14) Thus, the Department determined that under the Code, these uses were nonconforming and could be expanded on the project site through a CUP. (Exhibit 14)

24. The Department approved the CUP with conditions on the direction and shielding of lighting, measures to minimize dust impacts during construction, and a requirement for vegetation and reforestation plans to be bonded prior to permit issuance and constructed in accordance with an approved mitigation plan.

Appeal

25. Greg Logan, Robert Barta, Nina Gettler, Allen Bennett and Dan McKnight filed a timely appeal of the CUP on April 13, 2007, which raised the following three broad issues listed in the Prehearing Order:

1A. Is the existing use of the project site a non-conforming use under the Shoreline Municipal Code?

1B. If the existing use of the site is a non-conforming use, is the proposal authorized by the CUP a proper expansion of that use?

2. Is the proposal authorized by the conditional use permit compatible with the "the character and appearance with the existing . . . development in the vicinity of the subject property"? (SMC 20.30.300.B.1)

3. Is the project site located within or adjacent to a critical area under the Shoreline Municipal Code associated with the Piliated Woodpecker, or with a tributary to Boeing Creek?

The issue of whether the CUP is compatible with the Comprehensive Plan was inadvertently omitted from the Prehearing Order. Nonetheless, because it was raised in the appeal and was addressed by all parties at hearing, it will be addressed in this decision.

26 With respect to Issue 1A, the Appellants dispute the nature of the existing use, claiming that it does not qualify as a utility use and that neither The Highlands Inc. nor the Highlands' Sewer District is a public utility as that term is defined in the Code. The Appellants allege further that none of the existing uses of the property were legally established and thus, cannot be nonconforming uses.

27. With respect to Issue 1B, The Appellants assert that because the uses authorized by the CUP are not permitted in the R4 zone, they cannot be allowed as nonconforming uses because they would create or increase a nonconformance with "Code standards," which the Appellants interpret as including use regulations.

28. The Appellants allege that the proposal authorized by the CUP is not compatible with their neighborhood due to visual impacts; dust; air pollution from vehicle engines, molds and fungi; and noise from maintenance workers, vehicle traffic, dumping of recycled materials and yard waste, and operations in the utility yard.

29. The Appellants also claim that the project site is located within, or adjacent to a piliated woodpecker habitat area and drains to Boeing Creek, and that the Department failed to consider this information when it issued the CUP.

Applicable Law

30. A "use" is an "activity or function carried out on an area of land, or in a building or structure located thereon. Any use subordinate or incidental to the primary use on a site is considered an accessory use." SMC 20.20.050.

31. SMC 20.30.280 A provides that "[a]ny use, structure, lot or other site improvement ... which was legally established prior to the effective date of the land use regulation that rendered it nonconforming, shall be considered nonconforming if: 1. The use is now prohibited or cannot meet use limitations applicable to the zone in which it is located"

32. SMC 20.30.280 D states that a nonconforming use "may be expanded subject to approval of a conditional use permit or a special use permit, whichever permit is required under the code, or if neither permit is required, then a conditional use permit; provided, a nonconformance with the Code standards shall not be created or increased."

33. A nonconforming use must "in substance be the same after the passage of the zoning ordinance as it was theretofore. However, the continuance of an existing nonconforming use carries with it all the incidents of that use which appertained to it when zoning laws were enacted.... A nonconforming use of land ... is not likely to remain static. As the use is exploited and economic changes occur, it may grow in volume or intensity, and periods of active use may become more frequent or of longer duration. These changes in the level of use may have profound impact upon property in the areas where they are located, but the zoning regulations seldom include specific provisions for restricting this kind of growth." *Keller v. Bellingham*, 20 Wn. App. 1, 10-11, 578 P.2d 881 (1978), *aff'd* 92 Wn. 2d 726, 600 P.2d 1256 (1979) (citations omitted).

34. "Although phasing out nonconforming uses may be a desirable policy of zoning legislation, the severity of limitations in phasing out such uses is within the discretion of the legislative body of the city." *Keller v. Bellingham*, 92 Wn.2d at 730-31.

35. SMC 20.30.300 A provides that the purpose of the CUP "is to locate a permitted use on a particular property, subject to conditions placed on the permitted use to ensure compatibility with nearby land uses." SMC 20.30.300 B states that a CUP "shall be granted by the City only if the applicant demonstrates that: 1. The conditional use permit is compatible with the Comprehensive Plan and designed in a manner which is compatible with the character and appearance with the existing or proposed development in the vicinity of the subject property;"

36. A "utility" is defined as a "[p]rivate or municipal corporation owning or operating ... facilities that comprise a system or systems for public service. Private utilities include only gas, electric, telecommunications, or water companies that are subject to the jurisdiction of the State Utilities and Transportation Commission and that have not been classified as competitive by the commission. SMC 20.20.050.

37. A "public agency" is "[a]ny agency, political subdivision or unit of local government of this State including, but not limited to, municipal corporations, special purpose districts and local service districts" SMC 20.20.040.

38. A "public agency or utility office" is an "office for the administration of any governmental or utility activity or program, with no outdoor storage" SMC 20.20.040.

39. A "public agency or utility yard" is a "facility for open or enclosed storage, repair, and maintenance of vehicles, equipment, or related materials, excluding document storage." SMC 20.20.040.

40. A public agency or utility office or yard, is not permitted outright in the R4 zone. They require a special use permit in this zone, and are permitted only as a re-use of a public school facility or surplus nonresidential facility, or accessory to a fire facility.

SMC 20.40.140, and .480. A public agency or utility yard is a permitted in the R4 zone “only on sites with utility district offices.” SMC 20.40.490.

41. Before the City of Shoreline incorporated in 1995, The Highlands was governed by the King County Code. It appears from the incomplete King County Code (KCC) materials in the record, that from 1963 through 1991, the KCC defined “public utility” as “a private business organization such as a public service corporation performing some public service and subject to special governmental regulations, or a governmental agency performing similar public services, the services by either of which are paid for directly by the recipients thereof. Such services shall include, but are not limited to, water supply, electric power, gas and transportation for persons and freight.” KCC 21.04.695. (Exhibit 16) It also appears that public utility business offices, storage buildings and yards may not have been a permitted use in the RS zone, applicable to The Highlands, as early as 1963. (Exhibit 16 [KCC 24.08.020 (12)(c)(1963); 21.08.070 B]).

42. An “interim recycling facility” is permitted by the SMC in the R4 zone if it is limited to “drop box facilities accessory to a public or community use such as a school, fire station or community center.” SMC 20.40.140 and .420

43. The King County Code in effect in 1993 defined a “yard or organic waste processing facility” as “a site where yard and garden wastes, including wood and land clearing debris, are processed into new products such as soil amendments and woodchips.”

44. The King County Code in effect in 1993 defined “interim recycling facility” as a “site or establishment engaged in collection or treatment of recyclable materials, which is not the final disposal site, and including: (A) Drop boxes; (B) Source-separated, organic waste processing facilities; and (C) Collection, separation and shipment of glass, metal, paper and other recyclables. Only “drop box facilities” accessory to a public or community use, such as a school, fire station or community center, were allowed in residential zones.

CONCLUSIONS

1. The CUP at issue in this case is a Type B action under Chapter 20.30 SMC. The Hearing Examiner has jurisdiction over this appeal pursuant to SMC 20.30.200. Under SMC 20.30.210, the grounds for an administrative appeal are limited to the following: (a) the Director exceeded his or her jurisdiction or authority; (b) the Director failed to follow applicable procedures in reaching the decision; (c) the Director committed an error of law; or (d) the findings, conclusions or decision prepared by the Director or review authority are not supported by substantial evidence.

2. Under Rule 5.7 of the Rules of Procedure for Administrative Hearings of the City of Shoreline, the Appellant has “the burden of establishing that the decision being challenged is not supported by substantial evidence.”

3. The only evidence in the record concerning the legal status of The Highlands, Inc. and the Highlands Sewer District, indicates that neither of these entities is a "public entity" under the Code, but that the Sewer District may qualify as a "utility" under SMC 20.20.050.

4. Because the project site does not encompass the entire Forty Acres, it does not include the "dumping area" or the utility yard north of Cascade Drive. Therefore, it is necessary to determine what uses on the project site are nonconforming.

5. The historical evidence in the record, including the declarations from long-time Highlands residents and the pictures in Exhibits 15 and 20 through 23, indicates that since at least the 1930s, the Applicant has had some type of maintenance facility and storage area for equipment and records, including some outdoor storage area, in approximately the present-day locations of the residential structure, maintenance shop and small outdoor storage area on the project site.

6. The maintenance and storage uses on the project site would predate at least the 1963 King County Zoning Code (and probably the first King County Zoning Code), and likely became nonconforming under that code. Exhibit 7, the building permit issued by King County in 1993, provides some support for the nonconforming status of these uses. The KCC sections in the record indicate that a public utility storage building and yard were not permitted uses in residential zones under the King County Code in 1993. Therefore, the fact that a building permit was issued to the Highlands Water District for such a building and re-gravel for the existing driveway in an RS zone indicates that King County may have recognized the nonconforming status of that use in 1993.

7. There is substantial evidence in the record to support the Director's decision that the existing uses of the project site for maintenance and storage of equipment, supplies and records of The Highlands Inc. and the Highlands Sewer District, although prohibited in the R4 zone under the Code, are legally-established nonconforming uses of the site. This nonconforming status extends to all legally-established, existing accessory uses of the site. *Keller v. Bellingham*, 20 Wn. App. 1 (1978)

8. SMC 20.30.280 D expressly allows for the expansion of a nonconforming use. This allows the uses on the project site to increase not just in intensity, as addressed in *Keller v. Bellingham*, *supra*, but in area.

9. SMC 20.30.280's requirement that the expansion of a nonconforming use not create or increase a nonconformance with Code standards refers to the standards chapters in the Code, such as the General Development Standards found in Chapter 20.50 SMC, and not to use regulations. Reading this section's reference to nonconformance with Code standards to include the Code's use regulations, as the Appellants suggest, would effectively prohibit expansion of nonconforming uses despite the fact that expansion is expressly allowed by the same sentence. This interpretation would lead to an absurd result. Statutes and municipal codes are to be interpreted in a manner that avoids

unlikely, absurd, or strained results. *Robertson v. Washington State Parks and Rec. Com'n*, 135 Wn.App. 1, 8, 145 P.3d 379 (2005). Although the Appellants may disagree with the policy behind SMC 20.30.280 D, it is within the discretion of the City's legislative body to adopt it. *Keller v Bellingham*, 92 Wn.2d at 730.

10. There is no evidence in the record that the proposal will create or increase nonconformance with the Code's development standards for the R4 zone.

11. Under SMC 20.40.140 and .420, the drop boxes for interim recycling of source-separated materials are a permitted use of the project site, as they will be accessory to a maintenance/meeting/storage use on the site, which would qualify as a "community use," i.e., a use for the benefit of the Highlands community.

12. The yard waste recycling function proposed for the project site will utilize trailers similar to those found at transfer stations rather than the smaller drop boxes. This use is not permitted in residential zones under SMC 20.40.140 and .420.

13. The regulations in existence in 1993, when the Applicant reports that it began centralized collection of yard waste, allowed such a use when accessory to "a public or community use". However, yard waste collection was done at the "dumping area," which is not located on the project site and thus, could not be accessory to the existing nonconforming uses on that site. Further, although yard waste collection may have been accessory to the overall residential use of The Highlands, there is no evidence in the record that it was ever accessory to any type of "community use" as that term is defined in the Code. Yard waste collection is not a nonconforming use of the project site.

14. SMC 20.30.280 D allows the expansion of a nonconforming use subject to approval of a conditional use permit which, in turn, must be compatible with the Comprehensive Plan. The Comprehensive Plan sets forth broad land use designations which are implemented through zoning. A nonconforming use, by definition, will be incompatible with the use requirements of the zoning code. Thus, it will likely be incompatible with some of the Comprehensive Plan's land use policies. Therefore, the intent behind the requirement that a nonconforming use expansion be reviewed through the conditional use process, a process designed to locate certain permitted uses, must have been that the expansion proposal be conditioned to be as compatible as possible with Comprehensive Plan land use policies. The Department reviewed the proposal in light of the Comprehensive Plan and determined that it was consistent with some land use policies. There is no evidence in the record demonstrating that this conclusion was incorrect.

15. The Highland Terrace residences sit at a higher elevation than their back yards. Thus, as approved, the structures proposed and the uses on the project site will be visible from some of the residences and decks during at least part of the year as the newly planted trees in the setback area mature. For the expansion of these nonconforming uses to be compatible with the adjacent residential development, conditions should be added to the CUP to incorporate the Applicant's assurances (Exhibit 3) that no supplies and equipment will be stored outside the structures, and to require some type of evergreen

understory planting in this area for purposes of visually screening the expanded use year-round.

16. Under the proposal, vehicle trips that presently originate from, or end at, the “dumping area” and the utility yard, both located outside the project site, will instead originate from, or end at the project site. And loading and unloading of maintenance and building materials, although intermittent, will always occur at the project site rather than some occurring off-site as they do now. Although the site presently produces some noise and dust for the adjacent residents, the evidence shows that these will increase with the expansion of the storage function at, and the relocation of the recycling function to the site. For the expansion of these nonconforming uses to be compatible with the adjacent residential development, a condition should be added to the CUP requiring some form of noise attenuation structure along the east side of the proposed development on the project site if reliable data demonstrates that such a structure would reduce, rather than increase noise levels on receiving properties at the elevations of the Highland Terrace residences adjacent to the project site. In accordance with Conclusion 15 above, the condition should require that any such structure be visually screened.

17. There is no evidence in the record that the project will produce air pollution or molds and fungi in excess of that which presently exists.

18. The evidence in the record demonstrates that the project site is not located within a fish and wildlife habitat conservation area or buffer under either state or City regulations. SMC 20.80.270 and Exhibit 28. The piliated woodpecker is listed as a state candidate species, and thus is included as a state priority species. However, unlike some other species of woodpeckers, the piliated woodpecker's priority area is limited to breeding areas, and no breeding areas have been observed on the site. (Exhibits 6 and 28)

19. The evidence in the record demonstrates that the project site is not located within a classified stream or wetland critical area or buffer.

DECISION

1. The Director’s decision that yard waste collection is a nonconforming use of the project site and a permitted use in the R4 zone under SMC 20.20.140 and .420 is **REVERSED**.

2. There is substantial evidence in the record that, with the addition of certain conditions related to visual, dust, and noise impacts, the proposal would be compatible with the character and appearance of adjacent residential development. Therefore, the decision is **REMANDED** to the Director to add conditions to the CUP that:

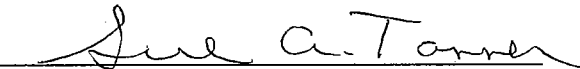
1) incorporate the Applicant’s assurances (Exhibit 3) that there will be no outside storage of supplies and equipment on the site (with the exception of natural materials stored in the proposed bins in the utility yard);

2) require some type of evergreen understory planting in the setback area along the east side of the property for purposes of visually screening the expanded use from the adjacent Highland Terrace properties year-round; and

3) require some form of noise attenuation structure along the east side of the proposed development on the project site if reliable data demonstrates that such a structure would reduce, rather than increase noise levels on receiving properties at the elevations of the Highland Terrace residences adjacent to the project site. If such a condition is imposed, any resulting structure should be visually screened from the residences on the Highland Terrace lots adjacent to the site.

3. In all other respects, the Director's decision is **AFFIRMED**:

Entered this 15 day of June, 2006.


Sue A. Tanner
Hearing Examiner

Concerning Further Review

NOTE: It is the responsibility of the person seeking to appeal a Hearing Examiner decision to consult Code sections and other appropriate sources, to determine applicable rights and responsibilities.

SMC 20.30.250 provides that "Any judicial appeal shall be filed in accordance with State law. If there is not a statutory time limit for filing a judicial appeal, the appeal shall be filed within 21 calendar days after a final decision is issued by the City."